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IN THE

SUPREME COURT OF THE UNITED STATES

Nos. 941 and 942
OCTOBER TERM, 1965

THE CRAWFORD COUNTY BAR ASSOCIATION, BY FINES F. BACHELOR, JR., PRESIDENT DAVID O. PARTAIN, VICE-PRESIDENT, and N. D. EDWARDS, SECRETARY-TREASURER ..... *Intervenors-Appellants*

and

CECIL L. ALEXANDER ..... *Intervenor-Appellant*

v.

ORVAL E. FAUBUS, GOVERNOR, KELLY BRYANT, SECRETARY OF STATE, and BRUCE BENNETT, ATTORNEY GENNERAL, BEING THE MEMBERS OF "THE BOARD OF APPORTIONMENT" OF THE STATE OF ARKANSAS ..... *Appellees*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

MOTION TO AFFIRM

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the grounds that the questions are so insubstantial as to not warrant further review or consideration.

OPINION BELOW

Proper reference has been made by the appellants in their respective statements to the two unanimous opinions, one reported and the other yet unpublished, of the district court which are set out verbatim as appendices of appellants' statement in case number 941.

JURISDICTION

The jurisdictional aspects are adequately stated by appellants and are not challenged by appellees.

QUESTIONS PRESENTED

The sole question presented by the Motion to Affirm is: Does the plan of apportionment as prepared by the appellees, the Board of Apportionment, comport with and satisfy the objectives contained in the pronouncements of the United States Supreme Court requiring that both houses of a bi-cameral state legislature be apportioned, qualified by other relevant factors, so that each member of each house represents approximately the same number of people?

FEDERAL CONSTITUTIOAL QUESTIONS INVOLVED

This case concerns the application of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

ARKANSAS CONSTITUTIONAL PROVISION INVOLVED

Also involved in this litigation is Amendment 45 of the Constitution of Arkansas which is contained in appellants' statement No. 941 as Appendix G.

STATEMENT

These are direct appeals from a final judgment entered on November 4, 1965, by a three-judge district court convened pursuant to 28 U.S.C. §§2281 and 2284, approving the redistricting and apportioning of the Senate and House of the General Assembly of Arkansas by the appellees, the Board of Apportionment.

The statements found in the jurisdictional statement filed by appellants contain a fair resume of the circumstances which culminated in the judgment of the district court. However, some further amplification is deemed beneficial to give proper prospective.

This suit was originally instituted on July 15, 1964, by a hopeful candidate, John Yancey, seeking election to the State Senate. He challenged the constitutionality of Amendment 45 to the Constitution of Arkansas. This Amendment created the Board of Apportionment and provided in essence, for the distribution of representatives and senafors for various districts and counties to the General Assembly.

A statutory court of three judges was convened and after presentation of evidence, argument and briefs, unanimously found that Amendment 45 failed to satisfy the requisites of due process of law as taught by the Reapportionment Cases.[1] **Yancey v. Faubus**, 238 F. Supp. 290 (E.D. Ark. 1965).

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[1]This category, as used by the district court includes: **Reynolds v Sims**, 377 U.S. 533; **W.M.C.A., Inc. v. Lomanzo**, 377 U.S. 633; **Maryland Committee for Fair Elections v. Tawes**, 377 U.S. 656; **Davis v Mann**. 377 U.S. 678; **Roman v. Sincock**, 377 U.S. 695; **Lucas v. Forty Fourth Colorado General Assembly**, 377 U.S. 713 (1964).

During the interim, litigation was instigated in a state court to clarify the status of Amendment 45. **Faubus v. Kinney,** 239 Ark. 443, 389 S.W. 2d 887 (1965).

Thereafter the Board of Apportionment submitted to the district court a plan of combining the 75 counties of the state into 44 House districts and 25 Senatorial districts. The number of representatives and senators remained as 100 and 35, respectively. The house and senate positions were distributed to the designated areas. The plan of apportionment accompanies the opinion of the district court as Appendix A.

After the plan was filed with the district court the two separate appellants asked, and were granted leave, to intervene. Also joining the intervention was Mac Evans, a State Representative of Van Buren County.

Subsequently, after briefing and argument by the original parties and intervenors, the district court unanimously adopted the plan and ordered its implementation for the general election to be held during November, 1966. Notices of appeal were seasonably filed and this appeal perfected.

ARGUMENT

The appellants in Case No. 941 constitute the Crawford County Bar Association and the appellant in Case No. 942 is currently a member of the House of Representatives of the General Assembly from Cleburne County, Arkansas.

Both of the jurisdictional statements submitted to the court are directed at alleged deficiencies of the plan offered by the appellees and accepted by the district court. Each statement challenges the scheme created by appellees and suggests different alternatives which could have been incorporated by the board of apportionment and so improve the distribution of representatives for state government. While these alternate plans do appear to possess some merit, they are not endorsed by appellants as infallible and are not totally free from criticism. Indeed, the appellants in their motions candidly concede that the scheme adopted by the district court does satisfy much of the complaint aimed at the prior distribution of House and Senate districts discovered by the district court in its first opinion concerning this case. *Yancey* v. *Faubus, supra,* 238 F. Supp. 290 (E.D. Ark. 1964).

Apparently all of the parties agree that a mathematical equation is unworkable if other relevant factors such as terrain, density of population, economical aspects, and the like are to be given appropriate consideration. Even at best, pure computation of apportionment by a mathematical formula has overriding onerous falacies. Hence, no vigorous attack is made by the appellants based alone on disparity of population within certain districts. The appellants merely argue that a more realistic criteria could have been employed to improve and further minimize the disparity of representation.

The statement of appellant Alexander insists that the Board of Apportionment did not consider the compatibility of counties grouped into districts and offers that matters of political expedience were paramount. However, a survey of Alexander's statement does not survive scrutiny. Besides some vague reference of economic factors and geographical location the record is void of any bonafide evidence that either Cleburne or Van Buren Counties possess interest adverse to Faulkner County. To be sure, Faulkner County does have a significantly greater population than the total of Van Buren and Cleburne Counties. It is submitted that this factor alone does not demand the conclusion that a representative or representatives if elected from Faulkner County would work solely to the benefit of Faulkner County and not bear forth the interest of Van Buren or Cleburne Counties. If this proposition were meritorious, it could be rationally reduced to absurdity. The alderman does not represent only the interest of the block where he lives nor does the United States Senator restrict his efforts to his native county. The short answer to appellant's challenge is that there exists in law a strong presumption that public officials fairly discharge their official obligations.

It is trite and careless, without even a hint of supporting evidence to argue that appellees composing the Board of Apportionment did not discharge their official duties and give serious, proper, and due consideration to such material factors as economics, geography, similarity of interests and the like. A study of the results of their efforts discloses an abiding dedication of the Board to couple all of the significant aspects to effective districting. It may be more reasonably presumed that these relevant factors were objectives of the Board of Apportionment which remained foremost from the beginning of

their labors. Some genuine features are inevitably sacrificed. Often two ends sought to be achieved are discovered to be in conflict. This does not equate with sophisticated discrimination.

The suggestion that the appellee Board of Apportionment was prompted by political motives is also anemic. A vain effort to foster support for this contention is presented in the form of certain clippings from two Little Rock newspapers and a brief quotation from the Atlantic Monthly. The proper procedure to submit evidentary matters during the course of the hearing was ignored by appellants. Their neglect or failure to exercise this right effectively bars this tardy argument. In any event, it is remarkable that appellant would be so bold as to urge this court to review a plan of apportionment on the strength that might be gleamed from press clippings and extracts from periodicals.

Perhaps the most significant proof that the plan as designed by the appellees is workable and equitable is the fact that only representatives of two counties of a total of 75 counties in the State of Arkansas have appealed the approval of the plan. Viewed from another direction, only a little over 30,000 of the population of 1,786,000 have seen fit to complain of the appellees' efforts as approved by the district court. Of course, any such analyzation on behalf of appellees ignores common sense. Assuredly, not all of the people in Crawford and Cleburne Counties are dissatisfied with the reapportionment. It would be ridiculous to offer that the balance of the population of Arkansas are satisfied. But the absence of appellants is compelling and worthy of mention.

At this juncture, however, more thought can be directed at another facet of appellants' arguments. It is

contended that the districting plan will work to the detriment and dilute the voting force of certain minority groups. Note, however, that not one organized minority has raised objection. This fact may not be persuasive alone unless recognition is taken that complaint voiced by minorities in Arkansas is the rule rather than the exception.

It is imperative that comment be made concerning the contention that House and Senate Districts comprising more than one county are identical. This only appears to be true of the 14th House and Senate Districts which include Faulkner, Cleburne and Van Buren counties. Thus overlapping does occur save in one instance.

Finally, answer must be supplied to the address of multi-county, multi-member districts. As concluded by the district court, there is nothing unconstitutional in such an arrangement. Cf. *Fortson* v. *Dorsey*, 379 U.S. 433. In *Reynolds* v. *Simms*, 377 U.S. 533, it was stated:

> . . . it is constitutionally valid to use political sub-division lines in establishing state legislature districts, so long as the resulting apportionment is based substantially on population and the equal population principal is not diluted in any significant way.
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> . . . states may legitimately desire to maintain the integrity of various political sub-divisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to

> partisan gerrymandering. Single-member districts may be the rule in one state, while another state might desire to achieve some flexibility by creating multi-member or floterial districts.

Later, in *Fortson* v. *Dorsey, supra,* it was observed:

> It is not contended that there is not substantial equality of population among the fifty-four senatorial districts. The equal protection argument is focused solely upon the question of whether county-wide voting in the seven multi-district counties results in denying the resident therein a vote approximately equal in weight to that of voters resident in the single-member constituenties. Contrary to the District Court, we cannot say it does.

It appears, at least, that all authority discovered by appellees is contrary to the proposition urged by appellants.

CONCLUSION

This suit received great attention, thought and consideration as is reflected by the two thorough opinions of the district court. It is a suit of great magnitude and significance to the people of Arkansas.

The task of reapportionment was arduous. It was completed with reluctance but painstaking care. The plan is equitable and the decision of the district court is in concert with the pronouncements and teachings of this Court.

The appellees urged that the holding of the court below be affirmed.

Respectfully submitted,

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